MOTION FILED
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No. 91-1607

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

KAISER STEEL RESOURCES, INC.,
formerly known as
KAISER STEEL CORPORATION,
Petitioner,
v.
PEARL BREWING COMPANY, et al., and
SECURITIES AND EXCHANGE COMMISSION,
Respondents.

KAISER STEEL RESOURCES, INC., formerly known as
KAISER STEEL CORPORATION,
Petitioner,
v.
ACTION TRADERS, INC., et al., and
SECURITIES AND EXCHANGE COMMISSION,
Respondents.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER KAISER STEEL RESOURCES, INC.'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND PROPOSED BRIEF

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Credit Managers Association of California respectfully moves the Court for leave to file the accompanying brief in

this case as *amicus curiae*. The consent of the attorneys for the following parties has been obtained to the filing of a brief by Credit Managers Association of California as *amicus curiae*: Kaiser Steel Resources Inc., petitioner; and Goldman, Sachs & Co., Asiel & Co., Marcus Schloss & Co., Inc., S.B. Lewis & Co., Marine Midland Bank, N.A., Robert Fleming, Inc., Eppler Guerin & Turner, Inc., Sutro & Co., Inc., A.G. Edwards & Sons, Inc., U.S. Clearing Corporation, Dillon, Read & Co., Inc., Curtis Associates, Inc., Allan Curtis, B/DR Arbitrage Fund, Goode-Adel Partnership, Trustee of Keystone Aggressive Stock Trust and Trustee of Keystone Custodian Fund, S-4, respondents.

Respondent Credit Managers Association did not receive any response to its inquiry seeking consent to its filing an amicus brief from the remaining parties except for Stephens Group, Inc. f/k/a Stephens Inc., Jackson T. Stephens and Mary Anne Stephens who refused to consent.

Applicant, Credit Managers of California, has an interest in this case in that it is a voluntary association of approximately 3,500 members generally representing the interests of unsecured trade creditors, particularly in the bankruptcy and insolvency area. It often serves as a disbursing agent under reorganization plans or as an officer of committees of creditors and, as such, has been and is involved in litigation concerning the setting aside of leveraged buyout transactions which raise the same issues as those raised in the present case. The brief of the petitioner in the present case argues that the rights of unsecured creditors, along with those of retirees, pensioners and the Pension Benefit Guaranty Corporation, are injured by the effect of the decision of the Court of Appeals for the Tenth Circuit. That brief does not, how-

ever, adequately address the impact of this decision on the nation's issuers of unsecured trade and supplier credit.

April 28, 1992

Respectfully submitted,

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INTEREST OF *AMICUS CURIAE*

Credit Managers Association of California ("CMAC") is the largest voluntary association of business credit issuers in the United States, representing approximately 3,500 members throughout the State of California. CMAC was incorporated as a California Corporation in 1961, and traces its origins to the Los Angeles Board of Trade, which was formed in 1883 to handle the problems of distressed business debtors and other issues of the Los Angeles business community. Through continued growth and merger with other similar organizations, CMAC has grown so that its service area now includes the entire State of California. CMAC is affiliated with the National Association of Credit Managers and is by far the largest of any of the over 65 regional associations affiliated with that association.

CMAC's adjustment bureau assists in the rehabilitation of distressed businesses and assists its members in the settlement of debts through extension agreements, compromise agreements and general assignments for the benefit of creditors. It serves in cases under Chapter 11 of the Bankruptcy Code (11 U.S.C. § 101 et. seq.) as the secretary to official committees of unsecured creditors formed pursuant to 11 U.S.C. § 1104 and as the bankruptcy court appointed Disbursing Agent and Plan Agent pursuant to 11 U.S.C. § 1123 under confirmed plans of reorganization. As such, CMAC often pursues claims held by debtors under the Bankruptcy Code, including claims to avoid fraudulent conveyances, for the benefit of unsecured creditors. In such capacities, CMAC has been the

plaintiff in numerous adversary proceedings seeking to set aside the transfer of corporate assets to shareholders in leveraged buyout transactions as fraudulent conveyances, illegal dividends and illegal distributions of funds held in trust by insolvent corporations for the benefit of creditors. In addition, CMAC provides educational services to its members and represents business credit interests before the California legislature.

The interests of business credit issuers are profoundly effected by the decision of the court below. The Tenth Circuit's decision has injected an unwarranted degree of uncertainty into the credit community's dealings with corporate entities, that increases the risk of non-payment, diminishes the chances of recovery in insolvent situations, and creates a loophole potentially capable of immunizing virtually every corporate distribution, whether large or small, from the legitimate claims of creditors. As a consequence, the effect of the Tenth Circuit's decision is to discourage voluntary settlements and encourage bankruptcy filings in order to gain the advantage of a new set of rules that is not warranted by the language of the bankruptcy code and was not within the intent of Congress. These new rules are contrary to the historic principles governing the distribution of assets of insolvent corporations that apply in non-bankruptcy situations and are contrary to the justified expectations of trade creditors dealing with corporate debtors. Moreover, the magnitude of cases to which this loophole may apply is enormous, ranging beyond the large and well publicized public takeovers of the past decade to include virtually every corporate stock transaction structured to include payment through a financial institution or brokerage house. As such, CMAC and its members have a substantial interest in the issues raised by this case. CMAC and its members therefore urge the Court to grant Kaiser

Steel Resources, Inc.'s ("Kaiser") petition for writ of certiorari because it presents important issues and because the lower court's decision departs significantly from the accepted course of decisions in this area of the law.

ARGUMENT

The Impact of the Decision Below on Trade Creditors is of Such a Magnitude That Immediate Review is Required

In its Petition, Kaiser points out the importance of the question raised to the 7,000 Kaiser retirees. It notes, almost in passing, the $250 to $500 million in unsecured creditors' claims that are being left largely unpaid in Kaiser's Chapter 11, while Kaiser's shareholders received $162,000,000 from the corporation's assets. While these creditors' may not present as sympathetic a symbol of the human devastation resulting from the LBO as do Kaiser's retirees, they should nonetheless be seen as a reminder of the impact of the lower court's decision on the national economy. When the depletion of corporate assets through an LBO results in insolvency, the burden of the transaction is invariably borne by the trade creditors of the failed business. As Kaiser points out, the LBO's of the 1980's were funded by debt typically running as high as 90% of capitalization. While the bank debt incurred in these transactions is repaid, it is the suppliers of goods and services and the other debt included in the transactions that remain unpaid.

Kaiser has demonstrated the magnitude of the impact of the LBO's of the 1980's in terms of the staggering amounts involved in the large, well-publicized transactions involving public companies. This alone presents a compelling argument for the need for immediate review of

the Tenth Circuit's decision. However, it is really only the tip of the iceberg. The Tenth Circuit's holding is equally applicable to any LBO that is accomplished through the use of a financial institution, stockbroker or clearing agency, regardless of whether or not publicly traded securities are involved. Some of the distributions immunized by the Tenth Circuit opinion were made directly by Bank of America to beneficial shareholders without passing through clearing agency and stock broker intermediaries.

Any LBO in which the payments are made by a bank arguably would fall within the protection of section 546(e) under the Tenth Circuit's interpretation. This literally would eliminate the ability of a trustee or creditors to avoid any LBO transaction. Even if the mere payment by a bank is not enough, structuring a transfer of corporate assets to shareholders through one of the enumerated qualifying intermediaries in order to launder those assets would be a painfully easy step. If Congress had intended by section 546(e) to make LBO distributions unavoidable it would surely have said so. Its use of the term "settlement payment," with its well defined meaning in the securities industry, indicates an entirely different and far more limited purpose: to protect the certainty of market trading activity. Protecting existing shareholders' receipt of consideration for the corporation to retire their stock is not within the scope of that purpose. Moreover, the protection of these shareholders at the expense of trade creditors represents an overturning of the basic principals of debtor-creditor relations in the corporate setting by leap-frogging the interests of equity over those of debt. This inequitable result, which is contrary to the normal expectations of the commercial community, should be reviewed and revised. Therefore, Kaiser's petition should be granted.

CONCLUSION

The decision of the Tenth Circuit is contrary to recognized law and causes an unjust and inequitable result. The impact on the nation's credit community is substantial and therefore the petition should be granted.

April 29, 1992

Respectfully submitted,

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